

STATE OF MICHIGAN
COURT OF APPEALS

MARY B. MYERS, Personal Representative of the
Estate of INEZ MAE MYERS, Deceased,

Plaintiff-Appellant,

v

MARSHALL MEDICAL ASSOCIATES, P.C.,
JAMES G. DOBBINS, M.D., THOMAS D.
DOBBINS, M.D., and TENDERCARE OF
MARSHALL,

Defendants-Appellees.

UNPUBLISHED
March 23, 2006

No. 264667
Calhoun Circuit Court
LC No. 05-001314-NH

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

In this wrongful death medical malpractice action, plaintiff Mary Myers appeals as of right from the trial court's order granting summary disposition to defendants Marshall Medical Associates, P.C., Dr. James G. Dobbins, Dr. Thomas D. Dobbins, and Tendercare of Marshall under MCR 2.116(C)(6) and (7). We reverse and remand.

I. Basic Facts And Procedural History

This wrongful death action is the second of two wrongful death actions brought against defendants in connection with their alleged failure to properly diagnose the decedent, Inez Mae Myers' pneumonia. There is no dispute that the last possible date of the alleged medical malpractice was April 30, 2000, and that the decedent died on May 12, 2000. Following her death, two different personal representatives brought two separate actions on behalf of her estate. A panel of this Court has previously reviewed the first action (*Myers I*).¹ The present case (*Myers II*) stems from the later filed action. To avoid confusion, we summarize each action separately.

¹ *Myers v Marshall Medical Assoc (Myers I)*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2005 (Docket No. 262590).

A. Myers I

On July 25, 2000, the probate court appointed Kevin Myers as personal representative of the decedent's estate, and he was issued letters of authority. But on January 25, 2002, the probate court terminated Kevin Myers' authority as personal representative. Regardless, on July 23, 2002, the estate, through Kevin Myers, served on defendants a notice of intent to file a claim pursuant to MCL 600.2912b. And on January 15, 2003, Kevin Myers filed a wrongful death medical malpractice action against defendants on behalf of the decedent's estate.

Defendants moved for summary disposition under MCR 2.116(C)(7), arguing that Kevin Myers' claim was barred by the statute of limitations. Defendants argued that the last date of the alleged malpractice was April 30, 2000, that the two-year medical malpractice limitations period set by MCL 600.5805(6) expired on April 30, 2002, and that the complaint was therefore untimely filed on January 15, 2003. Defendants further argued that, under *Waltz v Wyse*,² the two-year period set by MCL 600.5852, the wrongful death saving provision, was not tolled by filing a notice of intent, and that *Waltz* was to be applied retroactively.

On October 25, 2004, the trial court initially denied defendants' motions for summary disposition, reasoning that *Waltz* must be applied prospectively. On rehearing, however, relying on this Court's decision in *Ousley v McLaren*,³ the trial court reversed its previous ruling, granted defendants' motions for summary disposition, and dismissed the action with prejudice. Kevin Myers subsequently appealed to this Court.

Kevin Myers argued that the trial court erred in granting summary disposition because his cause of action was timely filed based on the operation of the wrongful death saving provision.⁴ Defendants countered that Kevin Myers misinterpreted MCL 600.5852 by suggesting that the three-year ceiling period may be used to create an effective five-year statute of limitations in a qualifying wrongful death medical malpractice action.⁵ This Court reversed and remanded for entry of an order of dismissal without prejudice, first noting that the notice of intent was not served within the period of limitations.⁶ This Court then explained its decision to reverse as follows:

We do not decide either of the parties [sic] contentions. Because the action was not properly commenced with a personal representative acting under letters of authority and there was no substitution of personal representative, the matter should not have gone forward to decision on the merits. Pursuant to MCL 600.2922(2), a wrongful death action shall be brought by the personal

² *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

³ *Ousley v McLaren*, 264 Mich App 486; 691 NW2d 817 (2004).

⁴ *Myers I*, *supra* at slip op p 2.

⁵ *Id.* at slip op p 2.

⁶ *Id.* at slip op p 2 n 1, citing *Waltz*, *supra* at 651.

representative of the estate of a deceased person. *Smith v Henry Ford Hosp*, 219 Mich App 555, 557-558; 557 NW2d 154 (1996). Here, Kevin Myers' authority to represent decedent's estate was revoked and the estate closed on January 25, 2002, nearly six months before the complaint was filed on June 15, 2003 [sic].^[7] In the absence of a valid personal representative, the action should have been dismissed. *Id.* at 561.^[8]

B. Myers II

On October 20, 2004, while *Myers I* was still pending in the trial court, the probate court issued letters of authority to a successor personal representative, Mary Myers, and the estate was reopened. On October 21, 2004, Mary Myers gave notice of intent to file a medical malpractice claim against defendants. And on April 14, 2005, Mary Myers filed a second wrongful death medical malpractice action against defendants.

Defendants moved for summary disposition under MCR 2.116(C)(6), arguing that *Myers I* and *Myers II* were substantially the same case, and that, at that time, *Myers I* was still pending on appeal in this Court. Defendants again argued that they were entitled to summary disposition under MCR 2.116(C)(7), on the ground that the claim was not timely filed under either the medical malpractice statute of limitations or the wrongful death saving provision.

In opposing defendants' motions, Mary Myers argued that her complaint was timely because it was filed within two years after her letters of authority were issued. More specifically, Mary Myers contended that, pursuant to MCL 600.5852 and *Eggleston v Bio-Medical Applications of Detroit, Inc.*,⁹ a successor personal representative could commence an action within two years from the date letters of authority were issued to her. Mary Myers further argued that *Waltz* was inapplicable. Finally, Mary Myers asserted that defendants were not entitled to summary disposition under MCR 2.116(C)(6), because the personal representative in each action was different and that, pursuant to *Eggleston*, the applicable statutory provisions were applied differently when there was an initial personal representative and a successor personal representative.

The trial court granted defendants' motions under both MCR 2.116(C)(6) and (7), ruling, in pertinent part:

There's a statute of limitations argument here when we're talking about the successor PR and the motions brought under [MCR] 2.116 (C)(7) . . . but I . . . agree with defendants that . . . there seems on its facts there's a distinction that

⁷ We note that the *Myers I* Court misstates the date of filing the complaint, but this oversight does not alter the Court's conclusion that the action should have been dismissed when the complaint was not filed until after Kevin Myers' authority was revoked.

⁸ *Myers I*, *supra* at slip op p 2.

⁹ *Eggleston v Bio-Medical Applications of Detroit, Inc.*, 468 Mich 29; 658 NW2d 139 (2003).

can be made between the situation we have here and the *Eggleston* case which is rather specific and is somewhat different on its facts

But in regard to the [MCR] 2.116(C)(6) motion which is really the *res judicata*, collateral estoppel court rule argument that you can't have a second case pending when you've appealed the first and then simultaneously have the same case pending in another court, in a trial court by refiling so to speak . . . with a different personal representative. I note that the personal representative, Ms. Myers, was appointed on October 20th, 2004 and the suit was filed on April 14th of 2005 and for reasons [plaintiff's counsel] has alluded to but the dismissal by Judge [Allen L.] Garbrecht was April 22nd, well after Ms. Myers was appointed . . . so there are some differences but it seems to me that . . . in effect, what's happening is that . . . substantially the same parties or identical parties over the same issue are litigating again or trying to litigate . . . by filing a suit about the same thing with the same people involved in the trial court while the appeal is pending. I agree that that just can't happen.

* * *

I'm not too sure about the other one but I think that's probably well taken argument in regard to . . . the statute of limitations side of the question.

So for both reasons and under both sections of the rule with regard to summary disposition, I'll grant the motions of each of the defendants

This appeal followed.

II. Summary Disposition

A. Standard Of Review

We review de novo a trial court's ruling on a motion for summary disposition.¹⁰

B. Statute of Limitations

Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them."^[11]

¹⁰ *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

¹¹ *Waltz, supra* at 647-648, quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).

Whether a period of limitation applies in particular circumstances is a legal question that we also review de novo.¹²

“[I]n all actions brought under the wrongful death statute, the limitations period will be governed by the provision applicable to the liability theory of the underlying wrongful act.”¹³ Therefore, we must apply the two-year medical malpractice statute of limitations.^{14, 15} It is undisputed that the decedent’s claim accrued on April 30, 2000. It is likewise undisputed that the two-year medical malpractice period of limitations, therefore, expired on April 30, 2002. What is disputed is whether the action brought by Mary Myers’ (*Myers II*) was timely filed. For purposes of resolving this question, and despite defendants’ attempted reliance on the date Kevin Myers filed the complaint in *Myers I*, January 15, 2003, we identify the salient date for this action as the date Mary Myers, as a duly appointed personal representative, filed *Myers II*—April 14, 2005.

Because this action was filed after the two-year medical malpractice period of limitations expired on April 30, 2002, to withstand summary disposition under MCR 2.116(C)(7), Mary Myers must demonstrate that a statutory exception to the limitations period applies.¹⁶ There are two exceptions relevant to this case, the notice tolling provision,¹⁷ and the wrongful death saving provision.¹⁸

At the time this action arose in 2000, the notice tolling provision, provided that the “statutes of limitations or repose” is tolled in the following relevant circumstance:

¹² *Detroit v 19675 Hasse*, 258 Mich App 438, 444-445; 671 NW2d 150 (2003).

¹³ *Jenkins v Patel*, 471 Mich 158, 164-165; 684 NW2d 346 (2004), quoting *Hawkins v Regional Medical Laboratories, PC*, 415 Mich 420, 436; 329 NW2d 729 (1982).

¹⁴ See MCL 600.5805(1) and (5) (we note that former MCL 600.5805[5] was renumbered as subsection (6), effective March 31, 2003, pursuant to 2002 PA 715. But because subsection [5] prescribed the period of limitation applicable at the time this cause of action accrued, MCL 600.5838a[1], we refer to subsection (5) in our analysis); MCL 600.5838a(2); *Jenkins, supra* at 165; *Waltz, supra* at 648.

¹⁵ In MCL 600.5838a(2), the Legislature provided that in addition to “the applicable period prescribed in section 5805 or sections 5851 to 5856,” a malpractice plaintiff may also file suit “within 6 months after the plaintiff discovers or should have discovered the existence of the claim.” But the parties do not rely on the discovery rule in this case.

¹⁶ See *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 571; 703 NW2d 115 (2005).

¹⁷ MCL 600.5856(d). Effective April 22, 2004, subsection (d) of § 5856 became subsection (c), and was reworded in a manner that does not appear to change the substantive meaning of the provision. 2004 PA 87.

¹⁸ MCL 600.5852.

If, during the applicable notice period under section 2912b, a claim would be barred by the statute of limitations or repose, for not longer than a number of days equal to the number of days in the applicable notice period after the date notice is given in compliance with section 2912b.^[19]

“[U]nder this provision, filing a notice of intent to sue will toll any period of limitations or repose, if such statutes . . . would otherwise bar the claim, for the time period set out in the written notice of intent provision (MCL 600.2912b[1]), that is, for a period not longer than 182 days.”²⁰

Under the notice tolling provision, Mary Myers’ action was not timely filed. The latest date of the alleged malpractice was April 30, 2000, and the two-year medical malpractice limitation period therefore expired on April 30, 2002. Even if it had been effective, the estate, through Kevin Myers, did not file its original notice of intent until July 23, 2002, beyond the two-year limitations period. Therefore, because they were both filed outside the limitations period, neither Kevin Myers’ notice of intent nor Mary Myers’ later filed notice of intent could have operated to toll the limitations period.²¹

Extension of the two-year medical malpractice period of limitation may also occur pursuant to the wrongful death saving provision, which provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.^[22]

Interpreting this provision, this Court has explained that “a personal representative may file a medical malpractice suit on behalf of a deceased person for two years after the letters of authority are issued, as long as that suit is commenced within three years after the two-year malpractice limitations period expired.”²³ Thus, in addition to the two-year period of limitation in § 5805(5), a personal representative may have an additional three years to file a wrongful death medical malpractice claim.²⁴ But, we note, the additional three-year period does not

¹⁹ MCL 600.5856(d).

²⁰ *Farley, supra* at 572.

²¹ *Waltz, supra* at 651.

²² MCL 600.5852.

²³ *Farley, supra* at 572-573.

²⁴ *Waltz, supra* at 648-649.

establish a wrongful death saving period separate from the two-year period after issuance of the letters of authority; “it is only a limitation on the two-year saving provision itself.”²⁵

Specifically, it does not authorize a personal representative to file suit at any time within three years after the period of limitations has run. Rather, the three-year ceiling limits the two-year saving period to those cases brought within three years of when the malpractice limitations period expired. As a result, while the three-year ceiling can *shorten* the two-year window during which a personal representative may file suit, it cannot *lengthen* it.^[26]

Because *Eggleston* firmly establishes that Mary Myers, as a successor personal representative, had a saving period that began when her letters of authority were issued,²⁷ the date of issuance of Kevin Myers’ letters of authority is irrelevant to this action. Further, contrary to defendants’ attempt to distinguish the present action from *Eggleston*, we find it irrelevant that in that case the original temporary personal representative died before he was able to file suit,²⁸ whereas, here, Keith Myers attempted to file an action but he was not authorized to do so. Similarly, we find the present circumstances distinguishable from other cases where a purported successor personal representative tried to revive an untimely, but otherwise valid, complaint.²⁹ Accordingly, Kevin Myers’ earlier attempt to bring an action on behalf of the estate did not deprive Mary Myers of her additional saving period.³⁰

Additionally, Mary Myers’ filing of her notice of intent on October 21, 2004, is irrelevant to our analysis of the wrongful death saving provision because, under *Waltz*, that filing of notice was inoperable to toll the wrongful death saving period.³¹

Mary Myers was appointed personal representative for the decedent’s estate and received her letters of authority on October 20, 2004. Although under the two-year savings period allowed by MCL 600.5852 after issuance of the letters of authority Mary Myers had until October 20, 2006 to file her action, under the three-year ceiling, she only had until April 30 2005, three years after the expiration of the medical malpractice limitation period, to pursue a

²⁵ *Farley*, *supra* at 575.

²⁶ *Id.* at 573 n 16 (emphasis in original).

²⁷ *Eggleston*, *supra* at 30; *McMiddleton v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005).

²⁸ *Eggleston*, *supra* at 31.

²⁹ See *McLean v McElhaney*, ___ Mich App ___; ___ NW2d ___ (Docket No. 257540, issued December 13, 2005); *Amon v Botsford General Hosp*, unpublished opinion per curiam of the Court of Appeals, issued December 27, 2005 (Docket No. 260252); *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229).

³⁰ See *Jackson v Henry Ford Health System*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2006 (Docket No. 263766).

³¹ *Waltz*, *supra* at 655; *Farley*, *supra* at 575; *Ousley*, *supra* at 495.

wrongful death medical malpractice claim on behalf of the decedent's estate. Mary Myers filed her complaint on April 14, 2005. Therefore, because Mary Myers filed her complaint within two years after letters of authority were issued to her, and within three years after the medical malpractice period of limitations had run, the action was timely.

We conclude that the trial court erred in holding that Mary Myers' action in *Myers II* was barred by the statute of limitations. Accordingly, we reverse the trial court's decision to dismiss Mary Myers' action under MCR 2.116(C)(7).

C. Prior Action Pending

Summary disposition is appropriate under MCR 2.116(C)(6) where "another action has been initiated between the same parties involving the same claim."³² "MCR 2.116(C)(6) is a codification of the former plea of abatement by prior action."³³ The purpose of the rule is to "stop parties from endlessly litigating matters involving the same questions and claims as those presented in pending litigation."³⁴ Although MCR 2.116(C)(6) is not operative when a prior suit is no longer pending at the time the motion for summary disposition is decided,³⁵ a case that is on appeal is pending for purposes of MCR 2.116(C)(6).³⁶

Here, *Myers I* was still pending in the trial court when Mary Myers filed this action. Moreover, *Myers I* was still pending on appeal when the trial court granted defendants' motions for summary disposition in this case.

But "[i]n order for a prior action to abate a subsequent action, the two suits must be based on the same or substantially same cause of action," and there must be sufficient identity of parties to justify an abatement.³⁷ In determining whether two actions are substantially the same for purposes of MCR 2.116(C)(6), the appropriate consideration is whether "[r]esolution of either action will require examination of the same operative facts."³⁸

Both *Myers I* and *Myers II* require examination of the same operative facts because both cases involve the same essential question whether the decedent received proper medical care from defendants. Furthermore, although Mary Myers noted in the proceedings below that Dr.

³² *Fast Air, Inc v Knight*, 235 Mich App 541, 544; 599 NW2d 489 (1999).

³³ *Id.* at 545.

³⁴ *Rowry v Univ of Mich*, 441 Mich 1, 20-21; 490 NW2d 305 (1992).

³⁵ *Fast Air Inc, supra* at 545.

³⁶ *Ford Motor Co v Jackson*, 47 Mich App 700, 702; 209 NW2d 794 (1973), *aff'd* 395 Mich 578 (1975).

³⁷ *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983).

³⁸ *JD Chandler Roofing Co, Inc v Dickson*, 149 Mich App 593, 601; 386 NW2d 605 (1986).

William Dobbins was a defendant in *Myers I*, but is not a party in this case, the “[c]omplete identity of the parties is not necessary” for purposes of MCR 2.116(C)(6).³⁹

“[I]t is not essential that defendants be entirely the same. If the actions are based upon substantially the same facts, the first will abate the second, at least as to those defendants who are named in both, although there are more defendants in one action than in the other.”^[40]

Thus, the fact that Dr. William Dobbins is not a defendant in this case did not preclude summary disposition under MCR 2.116(C)(6).

The purpose of the plea of abatement by prior action rule is to prevent harassment by new suits “brought by the *same plaintiff* involving the same questions as those in pending litigation.”⁴¹ Thus, “[i]f the plaintiffs in two actions are different, the first action cannot be pleaded in abatement of the second action, even where the defendants are the same and the other requisites of abatement are present.”⁴²

In *Ins Co of North America Cos v Canadian Nat’l R Co*, the Michigan Supreme Court recognized that dismissal of a lawsuit on the basis that a prior action was pending when the lawsuit was filed would be appropriate even though the plaintiff insurer was not a party to the first action, reasoning that the plaintiff insurer stood in the shoes of its predecessor.⁴³ This rationale would be applicable here if *Myers I* had been filed by a duly appointed personal representative, because MCL 700.3613 provides that “a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party.” Thus, in that instance, Mary Myers would be stepping into the shoes of the former personal representative. But as this Court decided in *Myers I*:

[T]he action was not properly commenced with a personal representative acting under letters of authority and there was no substitution of personal representative[; therefore,] the matter should not have gone forward to decision on the merits.^[44]

Mary Myers was neither a plaintiff in *Myers I*, nor can she be deemed a successor to the plaintiff in *Myers I*, because *Myers I* was never properly commenced with a duly appointed

³⁹ *Ross, supra* at 667; see also *JD Chandler Roofing Co, Inc, supra* at 598.

⁴⁰ *Chapple v Nat’l Hardwood Co*, 234 Mich 296, 298; 207 NW 888 (1926), quoting 1 Corpus Juris, p 78.

⁴¹ *Chapple, supra* at 298 (emphasis added).

⁴² 1 Am Jur 2d, Abatement, Survival & Revival, § 23, pp 109-110.

⁴³ *Ins Co of North America Cos v Canadian Nat’l R Co*, 360 Mich 125, 128; 103 NW2d 423 (1960) (emphasis added).

⁴⁴ *Myers I, supra* at slip op p 2.

personal representative. Therefore, Mary Myers does not stand in the shoes of a prior, duly appointed personal representative. For these reasons, dismissal under MCR 2.116(C)(6) was improper.

The parties additionally discuss the doctrine of res judicata.

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.^[45]

We conclude that res judicata is not applicable here because the trial court's rulings in *Myers I* did not and could not address the merits of the underlying substantive claim. More specifically, the trial court's rulings were limited to the issue of whether Kevin Myers had properly brought suit on behalf of the estate. Whether Mary Myers had additional time to bring her claim presents a separate question that requires application of the law to different facts. Furthermore, this Court in *Myers I* remanded that action for dismissal without prejudice because "the matter should not have gone forward to decision on the merits."⁴⁶ Therefore, barring the present action on res judicata grounds would not fulfill the purpose of the doctrine because it would not prevent litigation of the same cause of action when the cause of action was never actually litigated.

III. Conclusion

We conclude that the trial court erred in granting defendants summary disposition. In light of this decision, we find it unnecessary to address Mary Myers' remaining arguments concerning the retroactive application of *Waltz*, whether applying *Waltz* retroactively would violate plaintiff's right to due process, or the applicability of the doctrine of judicial tolling.

We reverse and remand. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ William C. Whitbeck
/s/ Peter D. O'Connell

⁴⁵ *Adair v Michigan*, 470 Mich 105, 121; 680 NW2d 386 (2004).

⁴⁶ *Myers I*, *supra* at slip op p 2.